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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

THE ORDER OF RAILROAD TELEGRAPHERS et al.,
Petitioners,

vs.

NEW ORLEANS, TEXAS AND MEXICO RAILWAY COMPANY et al.,
Respondents.

No. 449.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioners respectfully submit this request for reconsideration of the petition for certiorari herein, and as ground therefor submit the following considerations, not advanced in the original petition:

I. It is peculiarly appropriate that this Court review the present case because both decisions below turned exclusively upon the interpretation of recent decisions of this Court under the Railway Labor Act.

II. The denial by the Circuit Court of Appeals of injunctive relief against the awards of the National Railroad Adjustment Board sought in Count II of the petition, coupled with the silence of the court on the issues of that Count, amounts to a complete denial of relief, and to a virtual abdication of the judicial function.

III. The record reveals that this controversy and even this very lawsuit are of nationwide interest to organized labor.

I.

It Is Peculiarly Appropriate That This Court Review the Present Case Because Both Decisions Below Turned Exclusively Upon the Interpretation of Recent Decisions of This Court Under the Railway Labor Act.

In the trial court this case was erroneously dismissed for "nonjusticiability" under a misapplication of the doctrine of this Court in **General Committee v. MK&T** (1943), 320 U. S. 338. Upon appeal the Circuit Court of Appeals held that the trial court was in error on the jurisdictional point, but under a misapplication of this Court's intervening decision in **O. R. C. v. Pitney** (1946), 326 U. S. 561, refused to order relief, not only refusing a judgment on the contract attacked, but also refusing to order an injunction against awards of the National Railroad Adjustment Board which deprived these petitioners of their jobs without notice and hearing.

The factual situation in all three of these cases is substantially the same, and comparatively simple: In each case the legal issues arose when one of the railroad crafts negotiated and contracted with the carrier to take away the jobs or work of another craft, not parties to the deal. By thus conniving with the carrier behind the backs of the other craft, the aggressive craft impaired or diminished the positions and seniority rights or work of the

third-party craft. In other words, the aggressive craft used collective bargaining to enlarge its work jurisdiction, inducing the carrier to forget or omit the requirements of the Railway Labor Act. In particular, Section 6 was violated, which requires 30 days notice to the craft affected before making any changes in its rules or working conditions.

Thus, in the case of **General Committee v. MK&T**, supra, the locomotive firemen sought to bargain with the carrier at the expense of the engineers (by regulating in their own favor certain work schedules) and this Court held (in the face of the argument that the firemen had exceeded their representative authority) that a dispute **as to representation** was within the exclusive and final jurisdiction of the Mediation Board and "non-justiciable" in a court action for declaratory judgment. Violation of Section 6 was not alleged or discussed.

Convinced that the doctrine of non-justiciability could not apply where a clear violation of Section 6 was alleged, petitioners filed this case, in March 1944, to have the illegal contract set aside (not challenging the authority of the respondent union to bargain for its own craft) but claiming a clear and deliberate violation of Section 6 of the Act by the carrier. The petitioners not only asked for a declaration that the offending contract was invalid, but also asked that its enforcement be denied, because in this case the clerks had obtained six awards of the Railroad Adjustment Board applying the contract and abolishing the positions of the petitioners on these railroad lines.

The trial court unfortunately failed to make the proper distinction on the facts and on the law, and dismissed this case on both counts, under an erroneous application of the doctrine of "non-justiciability" (R. 661).

The petitioners again suffer on appeal by a misapplication in the Circuit Court of Appeals of the intervening

decision of this Court in **O. R. C. v. Pitney** (1946), 326 U. S. 561. In the Pitney case the trainmen had contracted with the carrier at the expense of the conductors for certain work and services, and, for the first time in this Court, the grounds of illegality there alleged were that the carrier had no right to make a contract which changed the working conditions of the complaining craft without the 30-day notice required by Section 6 of the Railway Labor Act. This Court upheld the jurisdiction of the courts to relieve against a clear violation of the command of Section 6 of the statute; but it was further held that the Court should "stay its hand" until the Adjustment Board had "the first opportunity to pass on the issue."

Now, in the instant case, the Adjustment Board has had an "opportunity to pass on the issue"; the record shows, as the Pitney case requires, that there has been a clear violation of the command of the statute. We submit that it is a misapplication of the doctrine of the Pitney case to hold that there must be **two** proceedings before the Adjustment Board before the courts can act: one at the behest of the complaining craft to interpret its contract, and another at the behest of the invading craft to enforce its contract. We do not believe that it was the intention of this Court in the Pitney case to require two such proceedings, especially where, as in this case, the complaining craft demanded to be heard in the proceedings by the invading craft before the Board and was denied hearing (R. 153). Surely it was not the intention of the Court to say that it takes two erroneous rulings of the Adjustment Board to make one law suit. We do not believe that it was the intention of this Court in the Pitney case to hold that there must be one proceeding before the Adjustment Board to establish the wrong against the injured parties, and another proceeding before the Adjustment Board to establish the right of the injured parties.

As a matter of fact, the spirit and principle of the Pitney

case is that the courts will intervene when administrative remedies have been reasonably exhausted and a clear violation of the statute still appears. That is exactly what has happened in this case.

The injustice of requiring petitioners to bring a repetitious proceeding before the Adjustment Board in this particular case is shown further by the Board's own acknowledgment, in its awards, and the respondents' own acknowledgment, in the pleadings, that such a proceeding would be futile. The Board says in the very awards attacked that it cannot do what the dictum of the Pitney case requires, namely, consider the contracts and rights of the petitioners. The Board says (R. 180):

> "If this Board should find in these cases that the carrier has breached its agreement with the Clerks, there must be an award in favor of the Clerks; the Board's sole function is the interpretation and application of the agreement. It can not alter an agreement for the relief of either party, even though it might appear that the work was also covered by an agreement with the third parties."

We have heretofore called the attention of the court to the admission by the respondents that it would be futile for these petitioners to bring an independent proceeding before the Board. Petitioners so allege in their petition (R. 24), and respondents admit the truth of the allegation in their answer (R. 119).

Exhaustion of Administrative Remedies.

We summarize for the court the following undisputed facts, which show that these petitioners have exhausted their administrative remedies in this case.

(1) The contract by which the Clerks in this case sought to bargain with the carrier at the expense of the

petitioners has already been interpreted and enforced by the National Railroad Adjustment Board in the awards attacked in the petition and set forth in the record (R. 162-248). The Adjustment Board has already acted, thus complying with the condition mentioned by this Court in the Pitney case as follows:

> "Only after the Adjustment Board acts but not until then can it plainly appear that such relief was necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy."

These petitioners have pleaded and proved in court the very awards under which the Adjustment Board interpreted the contract complained of, and sought relief against their enforcement. The very employees (Miller, Moore and Fuselier) who would lose positions under these awards, testified in court. Their positions, abolished by these awards, were specifically listed in their own contracts, which were in turn pleaded and introduced in evidence (R. 65-71).

By what logic can the Court of Appeals require a further "interpretation" by the Adjustment Board? What is there to "interpret" about a job listed in a contract and abolished?

(2) The individual petitioners sought in this case, by written demand, to intervene and be heard by the Board in the proceedings before the Board for enforcement of the illegal contract and were denied hearing (R. 153, 255). Was this not a logical method of complying with the very direction of this Court in the Pitney case that the Board should consider the contracts of other crafts where there is an interference, as in this case? That is what the petitioners sought to do and that is what the Board refused to do (R. 177-185).

(3) The direction of the Circuit Court of Appeals not only places upon the petitioners the burden of inducing the Board to reverse itself on the facts of this case, but also compels these petitioners to induce the Board to reverse its traditional practice (R. 177-185) without any ruling of the court on the practice in question. The Board has said, in the claims submitted to the court, that its sole function is the interpretation and application of the agreement before it and that it could not alter any agreement for the relief of any other party (R. 180). The court has not ruled that the Board is wrong. It does not set aside the awards entered upon that theory. It simply calls for more awards.

(4) The burden cast upon these petitioners is particularly heavy in this case. The irony contained in the direction of the Circuit Court of Appeals is manifest when it is realized that, as the record shows, the representative of the petitioning union has been removed from the Board (R. 148), while the representative of the respondent union is still a member of the Board (R. 596). There is, furthermore, ample indication in the record that the labor members of the entire Division are dominated by the respondent union (R. 148-152). Does this Court ask this petitioner to resort for impartial decision to such a tribunal? Is it likely that the Board will cheerfully entertain the grievances of these petitioners filed under authority of this lawsuit? Furthermore, this very lawsuit has been condemned by the Executive Council of the American Federation of Labor, a condemnation affirmed in part by the Annual Convention of the American Federation of Labor (R. 303-306).

Petitioners therefore submit that this Court should take jurisdiction of the case and clarify the dictum in the Pitney case by holding that where a violation of the com-

mand of the statute is clearly shown and the petitioners have exhausted their administrative remedy to the extent shown in this case, then the Court should relieve the aggrieved craft by invalidating the unlawful contract and enjoining the carrier from enforcing the awards of the Adjustment Board.

These petitioners have never and do not now ask the Court to determine the merits of a jurisdictional dispute. We submit merely that since collective bargaining and grievance procedure in the railway labor field is now regulated by law that it is the function of the courts to supervise the administration of the law, where all practicable measures have been taken for relief and where violation of the law is clearly demonstrated by the admitted facts, as in the present case.

II.

The Denial by the Circuit Court of Appeals of Injunctive Relief Against the Awards of the National Railroad Adjustment Board Sought in Count II of the Petition, Coupled With the Silence of the Court on the Issues of That Count, Amounts to a Complete Denial of Relief and to a Virtual Abdication of the Judicial Function.

It is manifest from the above that there is no occasion to remit these petitioners to the Board for further procedure. In addition, the Circuit Court of Appeals is silent with respect to Count II of the petition, which seeks an injunction to prevent the carrier from enforcing the awards of the Adjustment Board because those awards called for the abolition of petitioners' positions, and were entered without notice or hearing to these petitioners. The Circuit Court of Appeals simply vacates, without comment, the decision of the District Court which denied injunctive relief. No instructions or guidance is given to the

trial court as to what it is to do with respect to the prayer of the petition.

Under the facts of this case there are orders of the Adjustment Board outstanding still binding upon the carrier and still subjecting the jobs of these petitioners to abolition, without hearing.

The Issue Presented Is a Simple Denial of Due Process of Law.

Even if this Court is not ready to declare the contract invalid, the petitioners are entitled to injunctive relief on Count II. The awards attacked were entered without notice or hearing to these petitioners. It is not necessary to decide under Count II that the contract in issue was invalid. All that is necessary to decide under Count II was that an employee may not, without hearing of any kind, be deprived of his job and seniority rights by the order of this administrative board. The Circuit Court of Appeals is entirely silent on the issue. It does not decide anything about the rights of an employee to retain his job free from interference of an administrative board, absent notice and hearing. Surely, these petitioners are entitled to some ruling on this issue.

III.

The Record Reveals That This Controversy and Even This Very Lawsuit Are of Nationwide Interest to Organized Labor.

We believe that the Court will agree that the issues presented above are of real importance to organized labor generally and in particular to the effective administration of the Railway Labor Act.

Such a conclusion need not be left to inference. It happens that the record shows that this controversy, and even this very lawsuit, have had the repeated attention of the

railroad brotherhoods and even the American Federation of Labor. Strictly on the record, we mention below a few of the circumstances, indicating the importance of the case, which were not mentioned in the petition for certiorari herein:

(1) The chief executives of the "Nationally Organized Railway Labor Organizations Qualified to Participate in the Formation of the National Railroad Adjustment Board" deemed the issues before the Third Division of the National Railroad Adjustment Board between these very organizations and on these very railroad lines of sufficient importance to vote a change in the personnel of the Third Division, excluding the representative of the petitioning craft from membership thereon (R. 149).

(2) The controversy in the National Railroad Adjustment Board over deadlocking of the awards attacked in the petition was of sufficient importance to call for the ruling of the National Mediation Board (R. 155, 156).

(3) After this lawsuit was filed the respondent Brotherhood deemed the lawsuit of such importance that it filed a complaint against The Order of Railroad Telegraphers with the Executive Council of the American Federation of Labor and that body "deplored" the action of the petitioning organization in bringing this lawsuit (R. 305). This decision of the Executive Council was deemed of sufficient importance to be taken to the Annual Convention of the American Federation of Labor in 1944 and the petitioning Order was requested to abandon this very suit "as contrary to and in violation of the long established policy of the American Federation of Labor to oppose the use of the injunction against labor unions in labor disputes" (R. 305).*

*It is needless to say that this action was against the respondent carriers as well as respondent union and is not an ordinary "injunction suit." It should, however, be said that the American Federation of Labor was apparently not advised either of the facts or of the legal issues.

Explaining the Silence of the Respondents.

The Court may have gained the impression that because neither the carrier respondents nor the labor union respondents in this case filed any opposition to the petition herein, that it is of little importance.

The carrier has been "playing possum" in this case. The carrier failed to file any briefs and did not participate in the argument on appeal. The carrier has manifestly changed its position in the course of this controversy so many times that it is not in a position to appear in court. In choosing a vacillating course "between two fires" it has violated both law and principle and is apparently not in a position to rest its case on either.

As for the respondent B. R. C., it no doubt feels at this time that it can profit from the decision of the Circuit Court of Appeals which relegates your petitioners to the Adjustment Board, on which it is represented and on which these petitioners are not represented.

Aside from the denial of justice to these petitioners, it is respectfully submitted that the subject matter involved is of such importance as to require a reconsideration and the granting of a writ of certiorari in this case.

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Attorney for the Petitioners.

LEWIS, RICE, TUCKER, ALLEN & CHUBB,
RALPH E. KENNEDY,
Of Counsel.

R. Walston Chubb, attorney for petitioners herein, does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

R. Walston Chubb,
Attorney.

November 6th, 1946.